No. 22120

IN THE

United States Court of Appeals For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT, wife and husband,
Appellants,
v.
ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

Appellants respectfully submit that

(1) The sole substantial issue before this Court is whether, under the facts of the instant case, privity between appellants and appellee is a requisite to maintenance of an action based on the breach of an implied warranty;

(2) The Washington State Supreme Court, as manifested by its consistent expansion of warranty-based liability and its explicit recognition of the significant judicial trend toward abolition of the privity requirement, would compel submission of the warranty issue to the jury;

(3) Credible evidence was before the jury substantiating each of the essential facts upon which the expert witness presented by appellants predicated his opinions;

(4) The instructions requested by appellants properly stated the law applicable to an action based on a breach of warranty; and

(5) A trial court has an affirmative duty to instruct the jury on the law applicable to each material issue presented by the pleadings and the evidence.

I. The Sole Issue

For clarity, it must be emphasized that the trial court's refusal to instruct the jury, as to the alleged breach of implied warranty, was based solely upon the lack of privity between appellants and appellee.

The specific form of appellants' requested instructions as to the warranty and its alleged breach was never discussed with counsel, nor otherwise alluded to by the Court.

Similarly, the trial court, in announcing its decision to refuse to submit the warranty issue to the jury, pointed to no alleged deficiency in appellants' proof, but rather predicated said refusal expressly upon the assumed legal principle that privity was required.

As will be hereinafter analyzed, the jury had before it credible evidence to substantiate a determination that appellee had breached a warranty of fitness and suitability.

Thus, the sole issue squarely presented to this Court is whether, under the circumstances of the instant case, the

Washington State Supreme Court would require privity as a condition precedent to maintenance of an action based upon breach of warranty.

II. The Washington State Supreme Court Would Compel Submission of the Warranty Issue to the Jury

It is manifest that the past 10 to 15 years has witnessed a broad-scale judicial abolition of the privity requirement and a concomitant extension of warranty-based liability. Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn. L.Review 791 (1966); *Putnam v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964) (defective wheel chair); *Chapman v. Brown*, 198 F.Supp. 78, affirmed sub nom., *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962) (inflammable hula skirt); *Greeno v. Clark Equipment Co.*, 237 F.Supp. 817 (N.D. Ind. 1963) (automobile tire); *Spada v. Stauffer Chemical Co.*, 195 F. Supp. 819 (D.Ore. 1961) (weed killer); *Chairaluce v. Stanley Parner Management Corp.*, 236 F.Supp. 385 (D. Conn. 1964) (defective shoes); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966) (recovery by bystander against producer for injuries resulting from exploding beer keg); *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966) (recovery based upon commercial loss caused by defects in tractor); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1966) (defective battery).

Moreover, warranty-based liability has been specifically imposed upon manufacturers, or other processors, for injuries caused consumers by defective containers. Such liability has proceeded from a judicial recognition of (1) the general trend toward abrogation of the privity requirement as to all manufactured articles, and (2) the

lack of any valid distinction between a defective foodstuff, to which a common law warranty of fitness has historically applied, and a defective container in which the foodstuff is sold.

Cases so holding include

(1) *Kroger Company v. Bowman*, 411 S.W.2d 339 (Ky. 1967), adjudging a soft drink manufacturer liable to a remote consumer for injuries caused when a bottle fell from a defective carton in which the bottled drinks were sold;

(2) *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317, 323, 38 A.L.R.2d 887 (1958), wherein the court, in approving warranty-based recovery against the manufacturer and distributor for injuries sustained by a purchaser's child when a soft drink bottle exploded, stated: ". . . neither are we greatly concerned about the privity of contract;" and

(3) Cases previously cited in Appellants' opening brief (pages 11-14).

Contrary to appellee's assertions, warranty-based liability was imposed in the following cases despite the absence of privity:

(1) *Mahoney v. Shaker Square Beverages*, 102 N.E.2d 281, 288 (Ohio 1951), wherein the court, despite affirmatively recognizing the lack of privity between the plaintiff-employee and the defendant, affirmed recovery;

(2) *Jones v. Burgermeister Brewing Corporation*, 18 Cal.Reptr. 311, 313, 316, 198 Cal.App.2d 198 (Cal.-App. 1962), wherein the court, in reversing a judgment for the defendant bottler and the defendant distributor, stated:

"They (the defendants) denied the existence of a warranty as alleged by plaintiff.

"The jury not having been instructed on the issue of implied warranty, an essential issue in this case, the cause is remanded to the trial court."

(3) *Vallis v. Canada Dry Ginger Ale, Inc.*, 11 Cal. Reptr. 823, 826-827, 828-830, 190 Cal.App.2d 35 (Cal.App. 1961), an affirmative holding that the lack of privity is no defense to a warranty action based upon the bursting of a soft drink bottle, which states:

> "Whatever the arguments for limiting the manufacturer's strict liability to foodstuffs, *there is no rational basis for differentiating between foodstuffs and their containers.* Nichols v. Nold, 174 Kan. 613, 258 P.2d 317, 323, 38 A.L.R.2d 887; Cooper v. Newman, City Ct., 11 N.Y.S.2d 319, 320; Haller v. Rudman, 249 App.Div. 831, 292 N.Y.S. 586, 587; McIntyre v. Kansas City Coca Cola Bottling Co., D.C., 85 F.Supp. 708, 711; Mahoney v. Shaker Square Beverages, Ohio Com. Pl., 102 N.E.2d 281, 289; Geddling v. Marsh, (1920) 1 K.B. 668, 672-673; Morelli v. Fitch and Gibbons ((1928) 2 K.B. 636, 642-644; See Prosser, Torts, (2nd ed.) 84, p. 509." (Emphasis supplied)
>
> " 'This metaphysical distinction between the container and the contents can only be regarded as amazing.' " (Citing Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099, 1138).

The Washington State Supreme Court has expressly recognized and approved the trend toward complete abrogation of privity requirements in its extension of warranty-based liability to cases involving cosmetics, *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 354-355, 378 P.2d 298 (1963), and glass doors, *Dipangrazio v. Salamonsen*, 64 Wn.2d 720, 722-723, 393 P.2d 936 (1964) (relying upon *Greeman v. Yuba Power Products, Inc.*, 27 Cal.Rptr. 697, 377 P.2d 897 (1962), which case applies strict liability in tort without privity and without proof of negligence).

Similarly, the Washington State Supreme Court has repeatedly stated that a "realistic, judicial analysis and reappraisal of the privity rule" is merited, *Freeman v.*

Navarre, 47 Wn.2d 760, 289 P.2d 1015 (1955); *Brewer v. Oriard Powder Co.,* 66 Wn.2d 187, 401 P.2d 844 (1965); *Kadiak Fisheries Co. v. Murphy Diesel Co., Inc., et al,* 70 W.D.2d 148, 158, 422 P.2d 496 (1967).

Thus the *Brewer* case, 66 Wn.2d 187, *supra,* at 190-193, states:

> "Since 1842, when the Court of Exchequer decided the case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402, the law has been constantly developing and growing as it keeps pace with changing social philosophy and expanding methods of manufacturing and distribution. *There is a certain and steady trend in the direction of fixing greater responsibility in manufacturers and sellers.*
>
> ". . . *It must be recognized that we are now dealing with new vistas in the field of implied warranty.*" (Emphasis supplied)

Significantly, Dean Prosser lists Washington among those states which ". . . accept the strict liability, without negligence and without privity, as to the manufacturers of all types of products." Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn.L.Rev. 791, 794-795 (1966).

The expansion of the scope of warranty-based liability has been bottomed upon the recognition that the restrictive privity rule, being a judicial creation, could be abrogated judicially. Thus, the Pennsylvania Supreme Court has stated:

> "Furthermore, we recognize the social policy considerations behind imposing strict liability in tort upon all those who make or market any kind of defective product, *notwithstanding an absence of negligence on their part.*" *Miller v. Preitz,* 422 Pa. 383, 221 A.2d 320 (1966) (Emphasis Supplied).

> "We are today adopting a new basis of liability (Section 402A, Restatement of Torts)." *Webb v. Zern,* 220 A.2d 853, *supra,* at 854.

Significantly, in analogous situations, the Washington State Supreme Court has unhesitatingly amended and overruled its prior decisions because of changing social conditions. Thus, in *Friend v. Cove Methodist Church, Inc.,* 65 Wn.2d 174, 176, 178, 396 P.2d 546 (1964), the court, sitting *en banc,* in overruling prior cases and in abrogating in its entirety the doctrine of charitable immunity from tort liability, stated:

> "We then determined that, inasmuch as the doctrine was created by the court and not by act of the legislature, the court could properly repudiate it.
>
> " 'The almost unanimous view expressed in the recent decisions of our sister states is that, insofar as the rule of immunity was even justified because of the need of financial encouragement and protection, changed conditions have rendered the rule no longer necessary.' "

Similarly, in *Lockhart v. Besel,* 71 W.D.2d 109, 114, 426 P.2d 605 (1967), the Washington State Supreme Court, again sitting *en banc,* in overruling prior inconsistent cases and extending the measure of damages for the wrongful death of a minor child beyond those damages previously allowed (pecuniary loss only), stated:

> "This rule (the expanded measure of damages) is consistent with the better reasoned cases and the modern trend in other jurisdictions of this country."

Appellants submit that the Washington State Supreme Court would similarly adhere to the overwhelming trend in products liability cases toward complete abrogation of any privity requirements.

III. The Essential Facts are Established

Recognizing at the outset their burden of establishing that the bottle (Ex. A-2) was defective before it left appellee's premises, appellants submit that credible and substantial evidence of that and each other material fact was presented.

Evidence, largely uncontradicted and clearly probative, was presented to establish that

(1) the bottle (Ex. A-2), as originally manufactured, was not defective (Tr. 177, 327-328);

(2) the bottle was subjected to considerable pressure during appellee's capping (crowning) operation (Tr. 267);

(3) the bottle was not inspected for breakage after it was capped (Tr. 274-275, 276-277, 333);

(4) appellant Margie Elliott used due care in attempting to open the bottle with a standard bottle opener (Ex. A-1) and with a normal opening method (Tr. 28-30);

(5) Mrs. Elliott had personally purchased the 6-bottle carton, carried it home, and placed it in her refrigerator all without untoward incident (Tr. 25-26);

(6) she had previously opened 2 other bottles from the same carton, using the same opener and the same opening method, without mishap (Tr. 26, 28-29);

(7) the breakage of the bottle emanated from 2 crack lines (fractures) beginning beneath the cap and progressing downward (Ex. A-2; Tr. 144, 286, 326);

(8) there was extensive cracking underneath the cap of the bottle (Tr. 290);

(9) despite the fragmentation of the bottle, its cap remained firmly attached to it (Ex. A-2); Tr. 149, 158-159, 329);

(10) there was no impact damage to the bottle or to the cap (Tr. 149-150, 154, 289, 328); the breakage was not caused by an external blow (Tr. 328);

(11) there were no physical signs indicating that the bottle was in any way damaged after it left appellee's bottling plant (Tr. 162);

Mr. Smith, the expert witness presented by appellants, reasoned that the bottle was cracked and thus weakened by the pressure exerted in appellee's capping operation because

> ". . . opening pressures on a normal bottle, from a little wire tool of this type produced by hand, probably could not be developed under any conditions to produce two cracks simultaneously originating from the cap area of the bottle. There is no damage indicating that the opener is sharp or would have caused trouble, and most certainly the strength of the bottle normally is way beyond anything that an ordinary wire-type cap removing instrument could produce this type of thing normally." (Tr. 148-149)

> "A. The facts are quite evident to me from a technical standpoint that the bottle in normal condition, the cap in normal condition, that its seal could not be broken by mere opening attempts which do not even distort the cap. That is the primary significance. Bottles just don't fall apart. The fact that the cracks emerge and radiate from under the cap at the point of cap crimping, and the fact that both cracks propogate from that position downward, is supporting strength, and considerable supporting strength to the fact that a machine operation produced these cracks, weakened the bottle by actually producing cracks and fractures through the glass to the point where it

now is somewhat like the glazier's glass that has the scratch in it. This to me has had a crack in it from the capping operation, and in the absence of no surface damage that would come from normal handling in the store or the home." (Tr. 159-160)

Contrary to appellee's assertions, the record indicates that the bottle was subjected to considerable pressure (400 to 800 pounds) in appellee's capping operation (Tr. 267). Thus, Mr. Duncan, appellee's production superintendent, stated:

"Q. With respect to placing the cap or crown on the bottle, at one point or another it has to be crimped to get over that ring at the top of the bottle and to seal it so that the air can't get in; is that correct.

"A. Yes, sir." (Tr. 275)

"You see this have a bevel in it, the crimping throat. It is bigger at this end, and as it comes down over the bottle like that, it will tighten the skirt on the bottle like this, *from the pressure* (indicating)." (Tr. 276; Emphasis supplied)

"Q. Then does it squeeze against the skirt in order to crimp it?

"A. Oh, yes." (Tr. 280)

"Similarly, Mr. Kirk, appellee's expert witness, stated that the crimping throat on appellee's capping machine was beveled ". . . *to minimize if we can the amount of pressure* that is necessary to break that crown in its initial impact or the initial start of the crowning operation . . ." (Tr. 341; Emphasis supplied)

Thus, appellants submit that probative evidence was presented substantiating each of the facts essential to the opinions expressed by Mr. Smith. The following cases are apposite:

(1) *Jones v. Burgermeister Brewing Corp.*, 18 Cal. Reptr. 311, *supra*, at 313 which states:

"The evidence given in the instant case by the independent expert of the existence of a 'pronounced abrasion or scuff mark at the lower portion of bottle which was probably caused by grinding some hard object against the bottle * * *' was sufficient to require the court to properly instruct the jury on both issues of implied warranty and negligence."

(2) *Naumann v. Wehle Brewing Co.*, 15 A.2d 181, 182 (Conn. 1940), wherein the court affirmatively answered the following question:

"There was evidence that a defect in the bottle might cause the explosion and evidence which might be taken as eliminating all the other suggested possibilities above mentioned. There was nothing after delivery of the bottles to the plaintiff to account for the explosion from any other cause. The question is, therefore, was this a permissible inference?"

(3) *Kroger Company v. Bowman*, 411 S.W.2d 339 (Ky. 1967), *supra*, at 342, wherein the court stated:

"The facts under consideration need only warrant the inference, not compel it."

(4) *Helland v. Bridenstine*, 55 Wash. 470, 475, 104 Pac. 626 (1909), affirming a damages award (venereal disease allegedly caused by improper medical attention) despite expert medical testimony to the contrary, the court stating:

"The respondent was not required to prove her case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that she show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable."

(5) *Helman v. Sacred Heart Hospital*, 62 Wn.2d 136, 147, 148, 381 P.2d 605 (1963), affirming an award for damages caused by a staphylococcus infection despite contradictory opinion testimony of medical experts, the court stating:

"We do not have an inference founded upon another inference or conjecture, but rather strong circumstances pointing one way or the other from which the jury could and did find the ultimate facts.

"If, as we have shown, there was sufficient evidence of believable qualities arising from the direct and cross-examination of all witnesses, the courts ought not to weigh the quantum of evidence to determine if it balances on one side or the other. Weighing the evidence lies exclusively within the province of the jury."

(6) *Kuster v. Gould National Batteries,* 71 W.D.2d 463, 475, 429 P.2d 220 (1967), approving a warranty-based recovery for injuries caused by an exploding battery, wherein the court stated:

"Upon the physical facts presented by the evidence, the question of producing cause resolved itself into a conflict between expert opinions. We are satisfied that there was substantial evidence to sustain the findings of the trial court."

Significantly, the last two cases cited distinguish *Prentice v. United Pacific Insurance Company,* 5 Wn.2d 144, 106 P.2d 314, on which appellee relies.

Appellants submit that the instant case similarly resolved into a conflict of expert opinions. Appellants believe that Mr. Smith's opinions are far more plausible than Mr. Kirk's conjecture that the bottle fractured because an improper opening tool was abnormally used (Tr. 317).

However, appellants, recognizing that it is the jury's province to decide which opinions are more solidly based, simply request that the case be submitted to the jury under proper instructions as to the law.

IV. The Instructions Requested by Appellants Properly Stated the Law

Appellants submit that their proposed instructions numbered 3 and 12 properly state the basic guidelines to be followed by the jury in its determination of the instant case.

Proposed Instruction No. 3 states plainly that the jury, in order to find for appellants, must conclude that the bottle was defective and thus not reasonably fit for use, that the defect was present before the bottle left appellee's control, and that the defect caused appellant's injuries. Thus, the jury was informed as to all the prerequisites to a finding that an implied warranty had been breached.

Proposed Instruction No. 12 states plainly that a breach of warranty is separable from negligence, and that negligence need not be proven to establish a breach of warranty. Appellants submit that said instruction accurately states the law, *Lundquist v. Coca-Cola Bottling, Inc.*, 42 Wn.2d 170, 254 P.2d 488 (1953); *Frisken v. Art Strand Floor Covering, Inc.*, 47 Wn.2d 587, 592, 288 P.2d 1087 (1955), and that the failure to submit it to the jury prejudicially cast upon the appellants the burden of establishing appellee's negligence.

Appellee's argument (brief of appellee, pages 13-15) appears to concede the validity of the legal principles set forth in appellants' proposed instructions, but questions the affirmative manner in which said principles are stated. Apparently, appellee would prefer that any instruction with respect to the warranty and its breach be set forth

negatively instructing the jury that no recovery could be had "unless" certain facts were established.

In this context, it is noted that none of the 20 instructions proposed by appellee touch even tangentially upon the issue of implied warranty. Moreover, as previously indicated, the trial court did not concern itself with the form of the instructions proposed by appellants relating to the warranty, and its alleged breach, but rather ruled categorically that the warranty issue was not before the court because privity was absent.

Appellants' concern is not the manner in which the legal principles relevant to a breach of warranty action are presented to the jury. Appellants' concern is that its theory of the case was in no manner presented to the jury.

V. The Trial Court Had an Affirmative Duty to Instruct the Jury With Respect to the Alleged Warranty and Its Breach.

Appellants, recognizing that they have the prime duty to submit to the court proposed instructions correctly embodying the legal principles applicable to their theories of the case, submit that they have done so.

However, it is additionally submitted that a trial court has an affirmative duty to instruct the jury on the law applicable to each material issue presented by the pleadings and the evidence. *Hall v. Blackham*, 417 P.2d 664, 666 (Utah 1966); *Nichols v. Sonneman*, 418 P.2d 563, 568 (Idaho 1966).

Each party to a lawsuit is entitled to have his theory of the case presented to the jury. *Heinz v. Blagen Timber*

Company, et al, 71 W.D.2d 715, 431 P.2d 173 (Wn. 1967). The trial court, on its own motion, must properly charge the jury on the issues raised by the pleadings and the evidence in the case. *Marathon Battery Co. v. Kilpatrick,* 418 P.2d 900 (Okla. 1966).

If a requested instruction is not entirely proper, it is the duty of the trial court to correct it. *State ex rel. Mondale v. Gannons, Inc.,* 145 N.W.2d 321, 330 (Min. 1966). Thus, in *Jones v. Burgermeister Brewing Corporation,* 18 Cal.Reptr. 311, *supra,* at 315, the court, in response to respondent's assertion that the instructions proposed were faulty and that the court accordingly was not required to give them, stated:

> "This did not relieve the court of the responsibility to properly instruct the jury on the controlling legal principles applicable to the case."

CONCLUSION

Appellants again respectfully submit that the sole issue before this court is whether the breach of warranty issue should have been submitted to the jury. Appellants further assert that the form employed to instruct the jury as to a breach of warranty action is relatively inconsequential, but that they were prejudiced by the total failure of the trial court to submit the breach of warranty theory to the jury in any form.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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